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June 30, 2016

Ms. Marlene H. Dortch  
Secretary, Federal Communications Commission  
445 12<sup>th</sup> Street S.W.  
Washington, D.C. 20554

Dear Ms. Dortch:

We write to express our concern that the Commission's proposal in the navigation devices proceeding could have a severe impact on programmers like Music Choice and consumers who enjoy Music Choice's service.<sup>1/</sup> While Music Choice supports the Commission's goal of increasing consumer options for accessing video programming, the current proposal fails to take into account the variety of ways that programmers generate revenues from their programming, and overlooks the fact that accessing video programming sometimes can require close collaboration between video programmers and set-top box manufacturers. By interfering with these relationships, the proposal threatens to devalue Music Choice's service, and would actually create obstacles to consumers' ability to access it, contrary to the Commission's goals.

First, Music Choice's innovative technology that enables consumer access to its content will function as the launch pad for Music Choice's new MC Enhanced TV product. In many cases, this effort will require close coordination with set-top box manufacturers to ensure that Music Choice's service would allow consumers access as envisioned. Allowing set-top box manufacturers access to the MVPD service without requiring such coordination with Music Choice would interfere with consumer enjoyment of the service, devalue the Music Choice offering, and potentially conflict with intellectual property (including patents) Music Choice possesses in connection with its onscreen technology and the rights in that intellectual property licensed to the MVPD.

Second, as many programmers have documented in this proceeding, the Commission's current proposal to grant third party set-top box manufacturers access to MVPD video programming not only lacks protection of programmers' meticulously negotiated terms and agreements with MVPDs (that in many cases already ensure and further consumer access to vital, entertaining, interesting content through simple, easy-to-use and innovative interfaces), it

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<sup>1/</sup> Music Choice is a multi-platform video and music network programmer that delivers its music programming to consumers nationwide through their television, online and mobile devices. Music Choice currently has over 47 million monthly listeners and is available through consumer subscriptions to numerous multichannel video programming distributors ("MVPDs"), including Comcast Xfinity, Cox Communications, Verizon FiOS, Charter Communications, Time Warner Cable, and many more.

also fails to take into consideration existing programmer intellectual property and patent rights and the importance of restricting access to, and use of, consumer data, advertising rights and restrictions, and programmer copyright license and related security issues.<sup>2/</sup> Music Choice agrees with those comments that such interference would cause programmers serious financial harm and interfere with its ability to attract and retain viewers.

Retaining control over content and maintaining related negotiated presentation and positioning rights is critical to a programmer's ability to succeed in the marketplace. As the first digital audio service in the world offered to cable television subscribers (circa 1991), Music Choice possesses 25 years of experience in presenting music and related content to consumers in an interesting, innovative way and views its presentation requirements as a way to differentiate itself from its competitors, including other music services. Accordingly, Music Choice requires that MVPDs deliver Music Choice programming and services in their entirety, without modification, under specific terms regarding the presentation and positioning of content. These requirements are a vital part of Music Choice's business model.

Similarly, as the licensor of content from which MVPDs benefit through consumer viewership and related subscription revenue, Music Choice requires that it maintain substantial control over both the advertising placed on its content and data about consumer viewing of its services. Under the Commission's proposal, however, third party set-top box manufacturers would not be subject to any of these restrictions – even though it is highly unlikely Music Choice would have entered into a distribution agreement with such manufacturers without substantially similar restrictions.

Music Choice also agrees with the Recording Industry Association of America ("RIAA")'s concern that the Proposal could undermine the music MVPD market. The current music MVPD landscape protects copyright owners (*e.g.*, Music Choice and Sirius XM offer streaming music channels through MVPDs through statutory licensing under the Digital Millennium Copyright Act).<sup>3/</sup> These statutory licenses, however, require strict compliance with certain terms passed on by Music Choice and others like Sirius XM to MVPDs (including security and authentication requirements to prevent piracy). Without the express requirement that competitive device/user interface providers comply with the licensing grants to MVPDs, the potential for use of copyrighted music and similar content in an infringing manner is unacceptably high.

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<sup>2/</sup> See Comments of 21st Century Fox, Inc., et al., MB Docket No. 16-42, CS Docket 97-80, at 6-11, 34-39 (filed Apr. 22, 2016); Reply Comments of 21st Century Fox, Inc., et al., MB Docket No. 16-42, CS Docket 97-80, at 9-11, 15 (filed May 23, 2016); Comments of Comcast Corporation and NBCUniversal Media, LLC, MB Docket No. 16-42, CS Docket 97-80, at 46-54, 73-86 (filed Apr. 22, 2016); Comments of Revolt Media and TV LLC, MB Docket No. 16-42, CS Docket 97-80, at 2 (filed Apr. 22, 2016); Reply Comments of AMC Networks, Inc., MB Docket No. 16-42, CS Docket 97-80, at 2-4, 13 (filed May 23, 2016).

<sup>3/</sup> Comments of the RIAA, et al., MB Docket No. 16-42, CS Docket No. 97-80, at 6-7 (filed Apr. 22, 2016).

The alternative approach proposed by representatives of Vme TV, Revolt TV, TV One, the NCTA, AT&T/DIRECTV, and Comcast<sup>4/</sup> would alleviate several of the concerns expressed by Music Choice and other programmers. By maintaining the technical integrity of programmer applications accessed through the MVPD so that “consumer protections, content security, and the terms of the MVPD’s underlying programming licenses and the scope of rights granted by the programmers to the MVPD are fully enforced,” as well as protection of “copyrights, advertising, presentation and promotional terms that are essential for the creation and distribution of programming,”<sup>5/</sup> programmers would retain appropriate control over their programming, while still allowing consumers to access it through new third party user interfaces if they chose to do so. While many of the details may need to be evaluated further, Music Choice strongly supports such an approach and encourages the Commission to work with the industry on the Alternative Approach.

Protecting the proprietary and other rights of programmers, content owners, and consumers while promoting increased competition for navigation devices and user interfaces is not mutually exclusive. However, the Commission should appreciate that the licensing terms negotiated with MVPDs are not simply “wish lists” – they are vital to Music Choice’s and other programmers’ businesses and in Music Choice’s case, ensure music copyright compliance and respect for intellectual property while provided consumers ease of access to entertaining, interesting, high-quality content. We respectfully request that the Commission take steps to modify its initial proposal to ensure that competitive navigation device/user interface providers be required to comply with the terms of all MVPD underlying programming licenses, and that the scope of the rights granted by the programmers to the MVPDs be fully enforced against such competitive providers.

Respectfully submitted,

**/s/ Karen M. Reabuck**

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Vice President, Legal Affairs

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<sup>4/</sup> NCTA et al., *Ex Parte*, MB Docket No. 16-42, CS Docket No. 97-80 (filed June 16, 2016) (“Alternative Approach”).

<sup>5/</sup> Alternative Approach at 2.